Death Penalty Mitigation

A State Court Cannot Bar the Consideration of Mitigating Evidence if the Sentencer Could Reasonably Find That Such Evidence Warrants a Sentence Less Than Death

Failure to consider all relevant mitigation evidence in the penalty phase of a death penalty case constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.

In *Tennard v. Dretke*, 124 S. Ct. 2562 (2004), the United States Supreme Court was asked to decide whether evidence of a death penalty defendant's low IQ had been fairly presented so that the jury could fully consider and give effect to the evidence in the penalty phase of his trial.

Facts of the Case

In October 1986, a Texas jury convicted Robert Tennard of capital murder. The evidence presented at trial indicated Mr. Tennard and two accomplices killed two of his neighbors and robbed their home. Mr. Tennard stabbed one victim to death, and his accomplice killed the second victim with a hatchet.

To determine the appropriate penalty to impose, the jury had been instructed to consider two "special issues" used at that time in Texas to determine whether a sentence of life imprisonment or death would be imposed:

1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result (the "deliberateness special issue")?

2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (the "future-dangerousness special issue")?

During the penalty phase of the trial, Mr. Tennard's defense counsel presented one witness, Mr. Tennard's parole officer, who testified that the defendant's department of corrections record from a prior incarceration indicated he had an IQ of 67.

The government presented evidence of Mr. Tennard's prior conviction for rape, committed when he was 16. The rape victim testified she had escaped through a window when Mr. Tennard permitted her to take a bath after promising him she would not run away.

In his penalty phase closing argument, defense counsel relied on the defendant's low IQ score and the rape victim's testimony to suggest that Mr. Tennard's limited mental faculties and gullible nature mitigated his culpability. In rebuttal, the prosecution argued that Mr. Tennard's IQ level was not pertinent to the future-dangerousness special issue because the reason that he became dangerous was not relevant.

The jury answered both special issues in the affirmative and sentenced Mr. Tennard to death. Mr. Tennard was unsuccessful on direct appeal and sought state post-conviction relief. He argued that, in light of the instructions given to the jury in the penalty phase, his death penalty had been obtained in violation of the cruel and unusual punishment clause of the Eighth Amendment, as interpreted by the U.S. Supreme Court in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*).

In *Penry I*, the Supreme Court held that the Texas capital sentencing scheme provided a constitutionally inadequate vehicle for jurors to *consider* and *give effect* to the mitigating evidence of mental retardation and childhood abuse. "It is not enough simply to allow the defendant to present mitigating evidence, the sentencer must also be able to consider and give effect to that evidence." The Texas Court of Criminal Appeals rejected Mr. Tennard's *Penry* claim.

Mr. Tennard sought federal *habeas corpus* relief. The United Stated District Court denied his petition for *habeas corpus* relief and held that Mr. Tennard's single low score on an IQ test was not evidence that he was mentally retarded. Moreover, the district court concluded that, in any event, because his IQ evidence was before the jury, it had adequate means—via the two special issues—to give effect to the low IQ as mitigating evidence. The court subsequently denied Mr. Tennard a certificate of appealability (COA).

The United States Court of Appeals for the Fifth Circuit considered Mr. Tennard's argument that he was entitled to a COA. In the Fifth Circuit, the test applied to *Penry* claims involved the threshold inquiry of whether the petitioner presented "constitutionally relevant" mitigating evidence. In the *Penry* context, "constitutionally relevant" evidence means evidence of a "uniquely severe permanent handicap with which the defendant was burdened through no

fault of his own," and evidence that "the criminal act was attributable to this severe permanent condition."

The Fifth Circuit concluded that Mr. Tennard was not entitled to a COA for two reasons. First, it held that evidence of low IQ alone does not constitute a uniquely severe condition and rejected Mr. Tennard's claim that his evidence of low IQ was evidence of mental retardation. Second, the court held that even if the low IQ evidence constituted evidence of mental retardation, his *Penry* claim must fail because he did not show that the crime he committed was attributable to his low IQ.

Mr. Tennard filed a petition for *certiorari*. The Supreme Court granted the writ, vacated the judgment of the Fifth Circuit, and remanded for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002). The Fifth Circuit took the remand to be for consideration of a substantive *Atkins* claim. It observed that Mr. Tennard never argued that the Eighth Amendment prohibits his execution and reinstated its prior panel opinion. After Mr. Tennard appealed again, the Supreme Court granted *certiorari*.

Issue

The main issue considered was whether the Fifth Circuit improperly denied Mr. Tennard's COA because he had made substantial showing of a violation of a constitutional right. Put another way, had Mr. Tennard "demonstrated that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong?"

Ruling

A COA should have been issued because "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." The Court reversed the Fifth Circuit's judgment and remanded the case.

Reasoning

Pursuant to 28 U.S.C. § 2253(c)(2), a COA should be issued if the applicant has "made a substantial showing of the denial of a constitutional right." The Supreme Court has interpreted this to mean that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

The Supreme Court noted that although the Fifth Circuit "paid lipservice" to the principles guiding the issuance of a COA, its actual reasoning proceeded along a very different course. Instead of reviewing the District Court's analysis of the Texas court decision, it invoked its own restrictive gloss on *Penry I*.

The Fifth Circuit held that, in reviewing a *Penry* claim, a court must determine whether the mitigating evidence introduced was "constitutionally relevant" and "beyond the effective reach of the jury." To be "constitutionally relevant" the evidence must show a "uniquely severe permanent handicap with which the defendant was burdened through no fault of his own and the criminal act was attributable to this severe permanent condition." Only when the court finds the proffered mitigating evidence to be "constitutionally relevant" will it determine whether it was within "the effective reach of the jury". In denying Mr. Tennard's COA, the Fifth Circuit determined that the lower court had properly concluded he was precluded from a *Penry* claim because his low IQ bore no nexus to the crime, and thus the court need not consider whether his evidence had been within the "effective reach" of the jury.

The Supreme Court concluded the Fifth Circuit's "constitutional relevance" test in the *Penry* context "has no foundations in the decisions of this Court. Neither *Penry* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment."

In contrast to the Fifth Circuit's restrictive definition of "constitutional relevance," prior Supreme Court cases have actually spoken in the "most expansive" terms on the issue and held that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding." The question, therefore, is whether the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The Supreme Court noted that once this low threshold for relevance is met, the "Eighth Amendment requires the jury to be able to consider and give effect to" a capital defendant's mitigating evidence. The Court held that the Fifth Circuit's restrictive definition of "constitutional relevance" was incorrect. The Court further held that reasonable jurists would find the district court's disposition of Mr. Tennard's claim debatable or wrong and that he was thus entitled to a COA. Reasonable jurors could have concluded that the low IQ evidence was relevant mit-

igating evidence and that the state court's application of *Penry* to Mr. Tennard's case was unreasonable.

Dissent

In dissent, Justice Rehnquist argued that Mr. Tennard's IQ evidence was within the effective reach of the jury via the Texas "special issues" instructions. In separate dissents, Justices Scalia and Thomas reiterated their previously expressed views that unfettered sentencer discretion has no basis in the Constitution. Justices Rehnquist, Scalia, and Thomas would have affirmed the Fifth Circuit and denied a COA.

Discussion

This is the latest in a line of cases in which the Supreme Court continues to fashion and define its death penalty sentencing scheme.

Sarah Spain, PhD
Psychology Fellow
Court Psychiatric Clinic
Court of Common Pleas
Cleveland, OH

George W. Schmedlen, PhD, JD
Senior Clinical Instructor
Department of Psychiatry
Case Western Reserve University
Cleveland, OH

Juvenile Competence to Stand Trial

Alleged Juvenile Delinquents in Indiana Are Not Subject to the Adult Competency Statute

In *In Re K.G.*, 808 N.E.2d 631 (Ind. 2004), the state of Indiana appealed to the Supreme Court of Indiana to review a judgment from the Indiana Court of Appeals. The appeals court had affirmed a trial court judgment that determined that four alleged juvenile delinquents were subject to the adult competency statute.

Facts of the Case

Four alleged juvenile delinquents filed successful motions in Marion County Juvenile Court for psychiatric evaluations to determine their competence to stand trial. Each of the four was evaluated by mental health professionals, and the trial court determined that the juveniles lacked the ability to understand the proceedings and to assist in their defenses, in accordance with the Indiana adult competency statute, Ind. Code § 31-32-1-1.

K.G. was a 12-year-old boy who was accused of sexual battery and received a diagnosis of "mild to moderate mental retardation and autism" by the evaluating psychiatrist, Dr. David Posey. D.G. was a 10-year-old boy who was accused of child molesting and received a diagnosis of mild mental retardation and symptoms of attention deficit hyperactivity disorder (ADHD). D.C.B. was an 11-year-old boy who was accused of arson and received a diagnosis of mental retardation and a possible psychotic disorder. J.J.S. was a 13-year-old girl who was accused of burglary and theft and found to be "moderately to mildly mentally handicapped and functionally illiterate" by the evaluating psychologist, Dr. Paul Aleksic.

The four juveniles were initially placed in residential treatment centers. In March 2002, the trial court ordered that the juveniles be committed to the division of mental health for confinement in appropriate state psychiatric institutions.

The state of Indiana, through the mental health division of the Family and Social Services Administration, requested the trial court to vacate its order. The trial court would not vacate its order, although the court acknowledged that the division of mental health "[did] not currently have available appropriate facilities or programs" for the defendants. The state appealed to the Indiana Court of Appeals, which affirmed the judgment of the trial court.

Ruling

The Supreme Court of Indiana reversed the judgment of the trial court. The justices opined that juveniles were not subject to the adult competency statute, and the cases were remanded for further proceedings.

Reasoning

The appeals court had ruled that (1) juveniles have a constitutional right to have their competency determined before they are subjected to delinquency proceedings, and (2) because the juvenile code provides no procedure for determining the competency of children, the adult competency statute applies.

The Indiana Supreme Court agreed that a juvenile alleged to be delinquent has a constitutional right to

a competency assessment prior to delinquency proceedings. The court referred to the landmark case, *In re Gault*, 387 U.S. 1 (1967), in noting that, "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." The court wrote, "A juvenile charged with delinquency is entitled to have the court apply those common law jurisprudential principles which experience and reason have shown are necessary to give the accused the essence of a fair trial."

The Indiana Supreme Court rejected the appeals court's view that the juvenile code provides no procedure for determining the competency of children. The court acknowledged that Ind. Code § 31-32-1-1 provides, "If a child is alleged to be a delinquent child, the procedures governing criminal trials apply in all matters not covered by the juvenile law." However, the court reasoned that the juvenile code "must be liberally construed" to "ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation" (Ind. Code § 31-10-2-1(5)).

Ind. Code § 31-32-12-1 provides that "the [juvenile] court may also order medical examinations and treatment of the child under any circumstances otherwise permitted in this section." The supreme court concluded that this provision in the juvenile code allows for competency evaluations of children without the specific guidelines set forth for adult competency evaluations. Therefore, the adult competency statute does not apply to children.

Discussion

The Indiana Supreme Court reviewed the history of the juvenile court system, with focus on the *parens patriae* doctrine allowing the court to function in a parental role. The court wrote that *parens patriae*- "gives juvenile courts power to further the best interests of the child, which implies a broad discretion unknown in the adult criminal court system."

The United States Supreme Court decided a number of cases in the 1960s and 1970s that broadened juveniles' constitutional rights and thereby limited the discretion of juvenile courts. However, the Court has affirmed that the states have "a *parens patriae* interest in preserving and promoting the welfare of the child" (*Santosky v. Kramer*, 455 U.S. 745 (1982)).

Although there was no formal equal protection argument before the Indiana Supreme Court, the court nonetheless compared the rights of juveniles adjudicated delinquent to those alleged to be delinquent. If a child alleged to be delinquent were subject to adult competency law, then the child could be placed in a state psychiatric institution hundreds of miles away from his or her family. The justices noted that in most cases in which a juvenile is found to be delinquent, "the trial court is prohibited from placing the child in a facility outside the child's county of residence." Also, juvenile delinquents should be given dispositions, "in the least restrictive (most family like) and most appropriate setting available- . . .consistent with the best interest and special needs of the child." The justices wrote, "In our view no less is required for a juvenile only alleged to be delinquent."

Finally, it should be noted that the Indiana Supreme Court did not set any new guidelines for juvenile competency evaluations. Rather, they found that the adult guidelines did not apply to children and emphasized the broad discretion of the juvenile courts to create dispositions in the best interest of the child.

Jonathan W. Sirkin, MD
Northcoast Behavioral Health Care
Cleveland, OH

Undue Influence

Standards Revised for Rebutting Undue Influence in a Will Contest

In *Jackson v. Schrader*, 676 N.W.2d 599 (Iowa 2003), daughters Janice Schrader and Kathleen Jackson both appealed the ruling of the lower court regarding the estate of their deceased mother. At issue was whether their mother's 1992 will, as well as monies and gifts transmitted from the mother to one daughter during the last years of the mother's life, were the product of undue influence of the daughter on their mother.

The Supreme Court of Iowa held that the rule for rebutting the presumption of undue influence arising from a confidential relationship only requires that the grantee of the transaction prove by clear, satisfactory, and convincing evidence that the grantee acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily.

Facts of the Case

Kathleen Jackson and Janice Schrader were the daughters of Elmer and Martha Schrader. Beginning in 1973 and continuing until after the parents' death, substantial animosity existed between Kathleen and her parents. Kathleen twice sued Elmer and Martha for outstanding loans. She sued Martha for property after Elmer's death and had her parents arrested for entering her home.

In contrast, Janice enjoyed a close relationship with her parents. In 1974, Elmer and Martha executed wills, naming Janice as beneficiary in the event of their common deaths. In 1982, they made Janice the contingent beneficiary of their life insurance policy. When her father died in 1992, Janice was named sole beneficiary. Ten certificates of deposit held jointly by Elmer and Martha were designated payable to Janice on the death of the surviving spouse. Finally, Elmer gave a $28,000 gift to Janice and nothing to Kathleen.

After Elmer's death, an attorney advised Martha that she could reduce her estate's tax burden if she disclaimed certain property. Martha refused when she learned this would mean half her property would pass to Kathleen. The attorney also advised Martha about the tax benefits of providing annual gifts of $10,000 to her children. The attorney later testified that Martha was receptive to this idea with respect to Janice, but not to Kathleen.

In September 1992, Martha saw a different attorney to make a new will. This attorney testified that Martha appeared to be fully competent when she bequeathed her estate to Janice (minus $100,000 she bequeathed to Kathleen to avoid litigation). Martha also gave Janice power of attorney.

From 1992 to 1999, Martha made eight annual gifts of $10,000 to Janice. The early checks were signed by Martha, the last by Janice acting as power of attorney. In these years, Martha's certificates of deposit matured, and she purchased new certificates totaling $399,000 in joint tenancy with Janice. Martha died on July 17, 1999.

Martha was diagnosed with a brain tumor in 1986. Radioactive seeds were placed in the tumor in 1990 and 1994. In April 1992, a psychologist found her to have a full-scale IQ of 64 and testified that she had significant global impairment. Other doctors examined Martha but came to different conclusions regarding her mental capacity.

After Martha's death in 1999, Kathleen contested the will that was executed in September 1992. At trial, a jury found that Martha lacked testamentary capacity at the time she executed her 1992 will, due to the variation in her mental functioning caused by the brain tumor. The jury also found, however, that Martha continued to have sufficient mental capacity to engage in ordinary financial transactions until the end of 1996, including many but not all of the transfers of money Martha had made to Janice in the years prior to Martha's death. The jury discounted Martha's mental incapacity by reasoning that, although Martha performed poorly on intelligence testing, she functioned quite well in her ordinary and familiar world.

On the issue of undue influence, the jury concluded that a confidential relationship existed between Janice and Martha, based on the long history of trust and closeness between Janice and her parents. The jury considered whether the presumption of undue influence of Janice on Martha could be rebutted using the standard previously set forth by the Supreme Court of Iowa in *In re Estate of Todd*, 585 N.W.2d 273 (Iowa 1998). *Todd* indicated that four elements were necessary to rebut a presumption of undue influence in a confidential relationship. Specifically, the benefited party (Janice) would have to prove by clear, satisfactory, and convincing evidence the following: (1) lack of susceptibility of the grantor (Martha) to undue influence; (2) lack of opportunity to exercise such influence; (3) lack of disposition (by Janice) to influence unduly for the purpose of procuring an improper favor; and (4) a result clearly unaffected by undue influence. The trial court stated that since a confidential relationship presupposes the first two elements of susceptibility and opportunity, the presumption of undue influence in the confidential relationship between Janice and her mother could not be rebutted. As a result, the trial court decreed that Janice reimburse the estate for gifts and monies received in the course of her relationship with Martha—nearly $550,000. Janice appealed the order to reimburse her mother's estate, while Kathleen cross-appealed, urging that the trial court should have ordered a larger reimbursement.

Ruling

The Supreme Court of Iowa reversed in part and affirmed in part the trial court's decree requiring Janice to reimburse Martha's estate for gifts and monies

received in the course of her relationship with Martha. In partially reversing the trial court, the Supreme Court of Iowa found that nearly all of the gifts and monies transmitted from Martha to Janice were the product of Martha's free will and not the result of undue influence and that Martha had demonstrated a propensity outside of their confidential relationship to reward Janice in this manner. In partially affirming the trial court, the Supreme Court of Iowa upheld the ruling that Janice reimburse Martha's estate only for those gifts for which there was no specific proof of Martha's wishes outside of their confidential relationship and therefore the presumption of undue influence had not been rebutted.

With respect to the additional transactions of which Kathleen complained on her cross-appeal, the trial court's holding was affirmed. The Supreme Court of Iowa thus established a new standard for rebutting a presumption of undue influence: whether or not the end result was the product of undue influence.

Reasoning

The standard for rebutting a presumption of undue influence stated in *In re Estate of Todd* is unreasonably demanding and may cause the invalidation of *bona fide* transfers in a confidential relationship. In applying a more appropriate standard (whether the end result was the product of undue influence), the court's *de novo* review concluded the evidence failed to show that many of the challenged transactions were the product of undue influence.

The Iowa Supreme Court reviewed *Todd* and concluded that the criteria (from *In re Estate of Baessler*, 561 N.W.2d 88, 92 (Iowa Ct. App. 1997) to rebut the presumption of undue influence was unrealistic. The court examined other case law to hold that the rule for rebutting the presumption of undue influence arising from a confidential relationship only requires the grantee of a transaction to prove by clear, satisfactory, and convincing evidence that the grantee acted in good faith throughout the transaction and the grantor acted freely, intelligently, and voluntarily.

The court agreed with the lower court's reasoning that Martha had the mental capacity to engage in ordinary and familiar financial transactions such as those contested by Kathleen. The question of competency was therefore disposed of on the ground that Kathleen had failed to show that Martha lacked mental capacity at any specific time.

Discussion

Testamentary capacity—a person's ability to make a last will and testament—differs from undue influence. A person is presumed to have testamentary capacity, which requires a relatively low level of functioning. Specifically, to execute a valid will, a person must know she is making a will, appreciate the extent of her assets, identify her natural heirs, and understand how the will distributes her assets. A person who suffers from a mental disease or defect (including dementia) still may possess testamentary capacity as long as her compromised mental status does not influence the will.

Undue influence refers to the use of unscrupulous methods (such as threats or coercion) by a second person, to influence the decision-making process of the testator (the person making the will). Undue influence does not imply a lack of testamentary capacity; it suggests the testator was coerced into making a decision regarding her will. When wills are contested, the burden of proof is on the person contesting the will to show either lack of testamentary capacity or existence of undue influence.

This case changed the standard for rebutting a presumption of undue influence in Iowa from the cumbersome "quality of the confidential relationship" to the more reasonable "end result."

Joy Stankowski, MD
Staff Psychiatrist
Stephen G. Noffsinger, MD
Chief of Forensic Services
Northcoast Behavioral Health Care
Cleveland, OH

Insurance

An Insured's Mental Condition May Negate His Intent for a Criminal Act and Bar the Application of an Intentional-Act Exclusion Clause in a Homeowner's Policy

Facts of the Case

In *Allstate Insurance Co. v. Barron* (848 A.2d 1165 (Conn. 2004), during the early morning

hours of June 10, 1999, a homeowner's policyholder, Kelly S., who had bipolar disorder, stabbed her husband to death and then started a fire that killed her and two of the couple's children. Wrongful-death actions were filed against the policyholder's estate by the estates of the other decedents. The insurer claimed that it had no duty to defend or indemnify the policyholder's estate, because the incident was not an "occurrence" within the meaning of the policy and because the policy's exclusions relating to intentional or criminal acts applied to the policyholder's conduct. The insurer filed a declaratory judgment action against the defendants seeking a determination that it had no such duty. It then filed a motion for summary judgment claiming, *inter alia*, that there was no genuine issue of material fact as to whether the insured's conduct was intentional within the meaning of the policy's intentional-conduct exclusion clause.

The defendants objected to the motion for summary judgment. In support of their argument that there was a genuine issue of material fact as to whether Kelly's conduct had been intentional, the defendants presented to the court the transcript of the deposition of Dr. Kazarian, Kelly's treating psychiatrist. During her deposition, Dr. Kazarian testified that she had diagnosed bipolar II disorder in Kelly, but because she had not seen Kelly since July 2, 1998, she did not believe that she could give an opinion as to whether postpartum depression (Kelly was two months postpartum) had impaired Kelly's ability to tell right from wrong, to control her actions, or to form an intent during the events of June 10, 1999. The defendants also presented an affidavit by Walter Borden, an independent psychiatrist who reviewed the available information in this case and opined that ". . .Kelly was incapable of appreciating the nature of her behavior, unable to control herself and incapable of forming rational intent to do the acts attributed to her."

The Superior Court in the Judicial District of Waterbury (Connecticut), relying on the appellate court's decision in *Home Ins. Co. v. Aetna Life & Casualty Co.*, 644 A.2d 933 (Conn. Ct. App. 1994), concluded that, although Kazarian's testimony established that Kelly had had a severe mental illness in July, 1998, it did not create a factual dispute as to whether Kelly was "legally insane" when she committed the acts of June 10, 1999. The trial court also determined that Borden's affidavit did not constitute a basis for denying the motion for summary judgment, because it was conclusory and did not set forth any facts to support those conclusions. Accordingly, the trial court determined that there was no genuine issue of material fact as to whether Kelly had a mental condition negating her intent and barring application of the policy's exclusion for intentional acts, and it therefore granted the plaintiff's motion for summary judgment.

The defendants filed an appeal with the appellate court claiming that the trial court improperly determined that there was no genuine issue of material fact as to the insured's state of mind. The appeal was transferred to the Supreme Court of Connecticut pursuant to Connecticut General Statutes.

Ruling and Reasoning

The judgment was reversed and remanded for further proceedings. With regard to the defendants' claim that the trial court improperly determined that there was no genuine issue of material fact that Kelly's conduct was intentional within the meaning of the intentional-conduct exclusion clause, the Supreme Court of Connecticut reasoned that, under *Home Ins. Co.*, the crucial issue of fact in this case was not whether Kelly's actions were intentional in the narrow sense that they were deliberate, but whether her intent was negated by her inability to understand the wrongfulness of her conduct or to control her conduct. They concluded that the documents submitted by the plaintiff in support of its motion for summary judgment simply did not address that issue. Accordingly, they held that the trial court properly could have denied the plaintiff's motion in the absence of any objection or supporting documents filed by the defendants. With regard to the plaintiff's claim that Kelly's conduct was not "accidental" and, therefore, not an "occurrence" covered by the policy, the court concluded that, to the extent that Kelly engaged in conduct for which she could not be held responsible because her mental incapacity negated her intent, the consequences of her conduct were accidental and, therefore, an "occurrence" within the meaning of the policy.

Discussion

The question addressed in this case is whether a policyholder's mental condition could negate her intent for

a criminal act and bar the application of an intentional-act exclusion clause. Under the law, the terms of an insurance policy are construed according to the general rules of contract construction. The determinative question is the intent of the parties, that is, what coverage the insured expected to receive and what the insurer was to provide, as disclosed by the provisions of the policy. If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. However, when the words of an insurance contract are susceptible to two equally reasonable interpretations, the one that will sustain the claim and cover the loss must, in preference, be adopted. This rule of construction favorable to the insured extends to exclusion causes.

Intentional-act exclusion clauses were adopted primarily to prevent individuals from benefiting financially when they deliberately injure others. An individual who lacks the capacity to conform his or her behavior to acceptable standards of society will not, however, be deterred by the existence of insurance coverage for injuries caused by his or her actions. Therefore, the consideration of mental capacity when interpreting an exclusionary clause is not inconsistent with the purposes of such an exclusion. Furthermore, both principles meet the public interest in compensating victims for their injuries. Under a rule whereby damages caused by an insured's conduct are not denied coverage where the insured lacks a certain capacity, the injured person will have redress for his or her damages, even if the insured is judgment proof. However, some insurance companies have excluded coverage for:

> . . .an act or omission which is criminal in nature and committed by an insured person who lacked the mental capacity to appreciate the criminal nature or wrongfulness of the act or omission or to conform his or her conduct to the requirements of the law or to form the necessary intent under the law. . . such provisions have received unfriendly treatment from certain courts.

William H. Campbell, MD, MBA
Residency Program Director
Director of Clinical Services
Department of Psychiatry
University Hospitals of Cleveland
Cleveland, OH

Privacy Violation in Fitness-for-Duty Evaluation

Police Officer's Statements in a Department-Ordered Fitness-for-Duty Evaluation Are Protected Under Illinois Mental Health and Developmental Disabilities Confidentiality Act From Further Disclosure Without the Officer's Consent

Facts of the Case

In *McGreal v. Ostrov*, 368 F.3d 657 (7th Cir. 2004) James T. McGreal was a police officer for the Village of Alsip, Illinois. His superior officers, Chief of Police Kenneth Wood and Field Operations Commander Lt. David Snooks, were appointees of the longstanding mayor, Arnold Andrews. Mr. McGreal, following a series of incidents in which he felt that the mayor and other village officials had acted improperly, challenged Mayor Andrews in the 1997 election. After his failed attempt to unseat the mayor, Mr. McGreal found himself under "unprecedented scrutiny" from his departmental superiors. He filed reports detailing the alleged infractions, which in one case initiated an investigation into the conduct of the mayor.

In November 1997, Mr. McGreal was ordered to appear for an administrative interview to address the matter. Despite his undergoing many hours of interrogation over four months, no charges or disciplinary actions were brought against him. Instead, he was ordered to undergo a psychological evaluation to assess his fitness for duty.

Mr. McGreal was forced to sign a waiver with respect to the confidentiality and privacy of the information given to the psychologist and the dissemination of his report. He signed the waiver and noted it was "under duress." The psychologist's lengthy and detailed report concluded that to remain on the force, Mr. McGreal must "undertake a course of psychotherapy directed toward helping him gain insight into the vagaries of his reasoning processes, their potential for disruption in the police department and the community, and the relationship to his own psychological needs and functioning." Mr. McGreal agreed to the therapy, but Chief Wood chose to place him on paid sick leave until further notice. Mr. McGreal sued, and two weeks later he was terminated on the basis of "various acts of misconduct." Subsequent to the receipt of the report, Chief Wood forwarded the report to Mr. McGreal's colleagues in

the Fraternal Order of Police (FOP), supposedly in response to a grievance filed by Mr. McGreal, who objected to the disclosure of the report and questioned the validity of his consent and also the scope of the information disclosed in the report.

Mr. McGreal's suit claimed deprivation of First Amendment rights, deprivation of speech rights, and violation of the Illinois Mental Health and Developmental Disabilities Confidentiality Act arising from the disclosure of the psychological report. The defendants moved for a dismissal of the final count, noting that there was no therapeutic relationship between the psychologist and Mr. McGreal and that further, Mr. McGreal had signed a waiver of confidentiality. The defendants moved for summary judgment on the remaining counts. The court granted judgment in favor of all the defendants, and Mr. McGreal appealed.

The lower court, in granting the defendants' motion for summary judgment, found that the Illinois statute (the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1 *et seq*.) did not apply in this situation, because Mr. McGreal was not a "recipient" of the psychologist's report pursuant to the waiver he signed.

The questions of law presented to the appellate court included whether Mr. McGreal's First Amendment right outweighed the "government's interest as an employer in efficiently providing government services," and if not, would Mr. McGreal have been disciplined "even in the absence of his speech?" The final question, most pertinent to psychiatry, was whether the psychologist's fitness-for-duty report was covered by the Illinois Mental Health and Developmental Disabilities Confidentiality Act.

Ruling and Reasoning

The standard for granting a motion for summary judgment, as set forth in this case, is that Mr. McGreal need only demonstrate a genuine issue of material fact as to each element. All facts are construed in a light most favorable to Mr. McGreal, the party opposing summary judgment, and the court draws all reasonable inferences in his favor.

The appeals court found that Mr. McGreal's statements were worthy of First Amendment protection and that they played a substantial role in the department's decision to terminate him. However, they felt that there were "too many open questions" for a court to decide whether Mr. McGreal's First Amendment protection of speech was outweighed by the need for an employer to restrict such speech in the interest of "effective and efficient public service." With regard to The Village of Alsip's contention that it could not be held liable for the independent acts of the elected and appointed officials, the appeals court found instead that the Mayor and Chief Wood were acting as "final policymaking authorit[ies]" in initiating the termination process and mandating psychotherapy. This brings us to the final question of whether Mr. McGreal's communication with the appointed psychologist was protected by the Illinois Mental Health and Developmental Disabilities Confidentiality Act.

The appeals court found that Mr. McGreal was entitled to have a jury hear his claim regarding the necessity of the ordered psychological evaluation and whether the extent of the report's dissemination went beyond the circumscribed departmental interest to establish his fitness for duty. The court of appeals held that the psychological fitness-for-duty evaluation was protected under the Confidentiality Act. The appeals court reasoned that the evaluator was a psychologist, thereby qualifying as "therapist" under the Act, and that his examination and diagnosis qualified as mental health services, for which Mr. McGreal was recipient. Therefore, the final document constituted a protected mental health record.

The Illinois Supreme Court had held, in *Sangirardi v. Village of Stickney* 342 Ill. App.3d 1 (2003), that a police chief maintained authority to order fitness-for-duty evaluations of his officers in the interest of public safety and that logically the police chief was entitled to the results of the examinations. The appeals court pointed out that the Illinois Confidentiality Act contained a detailed consent form, as well as a defined exception to the strict confidentiality, that is, the consent to disclose. Therefore, there was no necessary conflict between the need for disclosure and the right to privacy. Any such disclosure, however, was restricted to "that which is necessary to accomplish a particular purpose." While Mr. McGreal had reluctantly agreed to sign a Consent for Evaluation form, under orders from Lt. Snooks, this consent was inconsistent with what was provided by the statute. Furthermore, Mr. McGreal's psychological evaluation, which included sensitive personal information not relevant to his fitness for duty, had been disseminated far beyond the superiors responsible for the determination of his fitness.

The appeals court noted that:

> The Confidentiality Act contains no disclosure exception for police departments performing mental health examinations to determine fitness for duty. It does allow for disclosure on consent, but the consent form used here does not meet the standards set forth by Illinois law. *See 740 ILCS 110/5*(*b*) (listing what is required for valid consent).

Further the appeals court noted:

> . . .that a recipient may consent to disclosure of information for a limited purpose and that any agency or person who obtains confidential and privileged information may not redisclose the information without the recipient's specific consent.

Discussion

With every forensic psychiatric evaluation, we begin with a statement documenting our disclosure to the evaluee that the information will be used in a report to the referring party and is, therefore, not confidential. We also explain that although we are psychiatrists, we have no patient-doctor relationship with those whom we evaluate in a forensic context. Yet, the Seventh Circuit Court of Appeals interpreted the application of the Illinois statute such that by virtue of the fact that the evaluator was a psychologist and in this role assessed Mr. McGreal, the forensic evaluation was construed as a mental health service. The report produced was therefore protected. The appellate court recognized that the statute does provide for a waiver in limited circumstances, but those exceptions must be narrowly read. The key facts on which this case turned are: (1) the waiver used did not meet the statutory exception to nondisclosure; (2) the Alsip Police Department redisclosed the report to another party, not required within the purpose of evaluating Mr. McGreal for his fitness for duty; and (3) the standard for review was that of a summary judgment motion interpreting an Illinois state statute. Thus, the *McGreal* decision instructs that forensic psychiatrists must follow the confidentiality statute(s) applicable in their jurisdiction. This means obtaining the legal consent specified by any relevant mental health confidentiality statute and limiting the dissemination to those permitted under the statute.

McGreal also raises questions about the "no doctor-patient" relationship that we define at the outset of our evaluations. This self-serving descriptor allows us to negate assumptions presumed in our medical role that cannot be reconciled with our forensic role. As forensic evaluators, we cannot promise to "first, do no harm" and that everything disclosed will remain strictly confidential. Yet, it is not only our psychiatric skill that allows us to elicit information from those we evaluate, but also the benevolent authority that is subsumed in the role of psychiatrist. It is precisely because of this combination of skill and authority that we are capable of eliciting information that an evaluee might not otherwise disclose. *McGreal* serves to remind us that with privilege comes responsibility. Under the wording of the Illinois Confidentiality Statue, by virtue of our identity as psychiatrists, we are providing mental health services to those we evaluate. Redefining ourselves at the start of the interview does not dismiss the evaluees' perceptions of us or reduce their vulnerability to our authority.

In sum, *McGreal* cautions that confidentiality remains paramount in all psychiatric services, and proper consent to disclosure should be obtained. Sensitive personal data that are irrelevant to the purpose of an evaluation should be withheld in the interest of privacy. And finally, we are reminded that disclosure is limited in scope and is permitted only for the purpose for which consent was provided.

Andrea Stolar, MD
Forensic Psychiatry Fellow
Case Western Reserve University
Cleveland, OH

Leslie M. Koblenz, MD, JD
Staff Psychiatrist
Northcoast Behavioral Health Care
Cleveland, OH

Psychiatric Treatment in Prison

The Guilty Defendant Does Not Have the Right to Sentence Departure for Treatment by a Private Psychiatrist Unless Extraordinary Circumstances Exist Under the Federal Sentencing Guidelines

In *United States v. Derbes*, 369 F.3d 579 (1st Cir. 2004), the First Circuit Court of Appeals considered whether a defendant who had pled guilty to tax evasion should have a downward sentence departure based on his alleged need for continued treatment by his private psychiatrist. In this case, there were no

extraordinary circumstances and there was no evidence that the defendant was unable to receive appropriate psychiatric care in prison; therefore, psychiatric treatment should not have caused a departure from sentencing guidelines.

Facts of the Case

Frank and Robert Derbes, the officers of Derbes Brothers, a construction company, defrauded the government through federal tax evasion. Frank Derbes caused a governmental revenue loss of $500,000. Both brothers pled guilty, and sentencing guidelines ranged from 15 to 21 months of imprisonment. Frank Derbes (defendant) was granted a four-level departure and sentenced to 9 months of home confinement with electronic monitoring and 15 months of probation.

The government appealed the downward departure in sentencing Frank Derbes. One of the sentencing departures for the defendant was for mental health concerns, and the other was the impact on employees of his small business. The defendant was under the care of a private psychiatrist, Dr. Chartock, for therapy and medication management. Dr. Chartock had treated the defendant's major depression and generalized anxiety disorder since 1997, and "it had taken several years to find the right combination of medications." Prior to treatment, the defendant had suicidal thoughts, occasional hallucinations, and some difficulty functioning. Dr. Chartock reported that it was critical to maintain the defendant's medication regimen of paroxetine, venlafaxine, and oxazepam and warned that changing medications could "[cause] him to revert to a deep depression and significant panic and anxiety." The defendant claimed that the specific medications might not be available in prison and that maintaining his relationship with Dr. Chartock was critical. The trial court judge stated, "The one thing I do not think the Bureau of Prisons could provide is the connection with Mr. Derbes' treating psychiatrist that has developed over time."

Ruling and Reasoning

The First Circuit Court of Appeals vacated the defendant's sentence and remanded the case for resentencing. The court found that the defendant's asserted need for treatment by his private psychiatrist was not a reason for sentence departure in this case.

Though the Protect Act (April 30, 2003) became law a day after the defendant was sentenced, it applied to his case on appeal. The Protect Act gave a new standard of review for sentencing guideline departures. The government presented evidence that two of the three drugs (paroxetine and venlafaxine) were in the formulary of the Bureau of Prisons. Further, oxazepam had "appropriate substitutes listed in the formulary." There was "little to show that it was the personal relationship that was essential to Derbes' mental health and nothing to show that some adequate substitute would be unavailable in prison." They cited guidelines that "mental condition is a discouraged basis for departure under the guidelines. . .warranted only if circumstances are extraordinary." There was no evidence that the defendant would not be able to receive adequate psychiatric medications and therapy in prison. However, sentence departures based on defendants' mental illnesses were not precluded in future cases.

Discussion

In this case, the First Circuit Court of Appeals did not allow a guilty defendant a downward sentence departure solely based on his asserted need for a continued personal relationship with his private psychiatrist. The defendant's medications or close substitute medications would be available in prison, and he had shown no evidence regarding the importance of his relationship with the single specific psychiatrist. However, the court did discuss the possibility that in other cases, with "extraordinary" circumstances, mental illness could be used for a departure from sentencing guidelines.

A lineage of landmark cases has established a right to treatment in prison. In *Estelle v. Gamble*, 429 U.S. 97 (1976), the U.S. Supreme Court found that "deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment." Prisoners were not entitled to the best medical care, but had a right to adequate medical care. In *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977), prison inmates' rights to mental health treatment for serious psychiatric and psychological conditions were made explicit, through the Eighth Amendment. Mr. Derbes' diagnoses of depression, panic, and anxiety would therefore qualify him to receive mental health treatment in prison.

The Federal Sentencing Guidelines were a congressional effort to achieve uniformity in sentencing. Sentencing tables were devised to give a guideline range of incarceration length. Factors involved in-

clude the seriousness and characteristics of the offense, criminal history, and specific listed adjustments. The Supreme Court is hearing cases currently regarding enhanced sentencing departures under the sentencing guidelines—specifically, whether the sentencing judge's finding of a fact that was not found by a jury can allow such a sentencing departure.

The ruling in *Derbes* was quite logical. If the court had ruled otherwise and did allow a downward sentence departure in Mr. Derbes' hardly extraordinary case, then any wealthy white-collar convicted criminal could expect a similar departure. It brings to mind Tony Soprano's crimes and the fact that he sees a psychiatrist (*The Sopranos*, HBO). If the court had allowed a sentence departure in this case, then theoretically when Tony Soprano would have charges under the Racketeer Influenced and Corrupt Organizations (RICO) Act brought against him, he could plead guilty. Then he could claim that his relationship with Dr. Melfi and treatment for depression and anxiety should allow him to stay out of prison, so that he could get his combination medication treatment and maintain his relationship with Dr. Melfi.

Susan Hatters Friedman, MD
Fellow in Forensic Psychiatry
Case Western Reserve University
Cleveland, OH

Phillip J. Resnick, MD
Professor of Psychiatry
Director, Division of Forensic Psychiatry
Case Western Reserve University
University Hospitals of Cleveland
Cleveland, OH

Sex Offender Laws

A Sex Offender May Be Banned From Parks Because of His Thoughts

In *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004), the United States Court of Appeals for the Seventh Circuit reheard *en banc* a case that had been decided previously by a three-judge panel (*Doe v. City of Lafayette, Indiana*, 334 F.3d 606 (7th Cir. 2003). The City of Lafayette, Indiana, banned a known sex offender from entering city parks after learning that he had gone to a park and thought about having sexual contact with children. The court held that the ban did not violate the First or the Fourteenth Amendments.

Facts of the Case

John Doe was a convicted sex offender whose past offenses included child molestation, attempted child molestation, voyeurism, exhibitionism, and peeping. He was most recently convicted in 1991, after he invited three adolescent boys into an alley, unzipped his pants, and offered to perform oral sex. For that offense, Mr. Doe was sentenced to four years of house arrest, followed by four years of probation. His probation ended in January 2000, just before the incident at issue in this case. Mr. Doe had been in treatment for his disorder since 1986, and he attended Sexual Addicts Anonymous, a 12-step group.

In January 2000, Mr. Doe entered a city park and watched five teenagers for 15 to 30 minutes. He then said to himself, "I've got to get out of here before I do something," and left the park. When asked about his thoughts as he entered the park and watched the children, Mr. Doe stated:

> [M]y thoughts were thoughts I had before when I see children, possibly expose myself to them, I thought about the possibility of. . .having some kind of sexual contact with the kids, but I know with four kids there, that's pretty difficult to do. . . . Those thoughts were there, but they. . .weren't realistic at the time. They were just thoughts.

After leaving the park, Mr. Doe emergently contacted his psychologist, discussed the incident in his 12-step group on his psychologist's advice, and voluntarily began receiving weekly Depo-Provera injections to suppress his sexual urges. Mr. Doe acknowledged that he had ongoing sexual thoughts about children, and his psychologist testified that, "like any other addict, [he] does not have control over his thoughts. . . . [He] will always have inappropriate thoughts."

An anonymous source reported the park incident to Mr. Doe's former probation officer. After the police department, the superintendent of parks and recreation, and the city attorney became involved, the city issued a ban that permanently prohibited Mr. Doe from entering any city park property, at any time, for any reason, under penalty of prosecution for trespass. In addition to traditional parks, affected park property included a golf course, a sports complex, a baseball stadium, and a zoo. Mr. Doe chal-

lenged the ban as unconstitutional in federal court. He argued that in punishing him for inappropriate thoughts, the ban violated his First Amendment right to freedom of thought. He also claimed that the ban violated his fundamental right to enjoy city parks.

The district court granted summary judgment to the city, reasoning that there could be no First Amendment violation in the absence of expressive speech and that the city's legitimate interest in protecting its children justified the incidental impact on Mr. Doe's thoughts. As for the Fourteenth Amendment, the district court held that there was no fundamental right to enter city parks and that the ban was rationally related to the city's legitimate interest.

The case was appealed and a three-judge panel of the Seventh Circuit reversed, holding that the ban violated Mr. Doe's First Amendment right to freedom of thought. On the city's petition, the Seventh Circuit reheard the case *en banc*.

Ruling and Reasoning

In an eight-to-three vote, the *en banc* Seventh Circuit affirmed the district court's decision. The court rejected Mr. Doe's First Amendment claim for several reasons. First, noting that the "core" of the First Amendment is protection of the right of self-expression, the court found that the right was not implicated in Mr. Doe's case, because Mr. Doe did not go to the park to engage in expression. Recognizing that the First Amendment also protects conduct that has a significant expressive element, the court reasoned that "going to the park in search of children to satisfy deviant desires" contained no expressive element.

The court acknowledged that the First Amendment would be implicated if the state were to punish an individual for "mere thought, unaccompanied by conduct," but explained that "regulations aimed at conduct which have only an incidental effect on thought" do not violate the First Amendment. The court further reasoned that thought accompanied by conduct is not necessarily protected, because all regulation of conduct has some indirect impact on thought. In this case, the court reasoned that Mr. Doe had engaged in "thought plus conduct." He "did not simply entertain thoughts; he brought himself to the brink of committing child molestation" by going to a park where he was likely to find vulnerable children. In light of his status as a known pedophile who had difficulty controlling his urges, prohibiting Mr. Doe from entering parks, for the protection of the city's children, did not violate the First Amendment.

The court also rejected Mr. Doe's Fourteenth Amendment claim. Noting that the characterization of the right at issue is crucial in a substantive due process analysis, the court framed the right that Mr. Doe asserted as "a right to enter the parks to loiter or for other innocent purposes." That right, the court reasoned, was not like others that the Supreme Court has considered "fundamental," such as the right to marry and have children, the right to bodily integrity, and the right to abortion. Fundamental rights are those that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed" (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Loitering in parks does not rise to that level.

Having determined that a fundamental right was not implicated, the court applied a rational-basis review, under which the ban would be acceptable so long as it was "rationally related to a legitimate government interest" (citing *Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003)). The court concluded that the city's banning of Mr. Doe, "a sexual addict who always will have inappropriate urges toward children," from public parks, a place where children are particularly vulnerable to abuse, was rationally related to its legitimate, even compelling, interest in safeguarding the well-being of minors.

The court added that it would have upheld the ban even under a strict-scrutiny standard, under which a regulation must be narrowly tailored to serve a compelling government interest. The ban was the least burdensome means of protecting children in parks. It could not have been limited to certain park areas or to a finite period of time, as Mr. Doe had argued, because the city cannot predict where children will be and because Mr. Doe's urges will not pass with time. The indefinite ban of his use of the entire park system was the "narrowest *reasonable* means for the City to advance its compelling interest of protecting its children from the demonstrable threat of sexual abuse by Mr. Doe" (emphasis in original).

Dissent

The dissent argued that the ban violated the First Amendment by punishing Mr. Doe on the basis of his immoral thoughts. The dissent cited a line of cases in which the Supreme Court has established the

right to "freedom of the mind," and noted that even immoral thoughts are protected. Potential harm or the possibility that thought may lead to action does not justify infringement on the right. In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002), the Supreme Court held that virtual child pornography could not be prohibited on the ground that it might encourage illegal acts, because "the prospect of crime. . .by itself does not justify laws suppressing protected speech." The dissent disagreed with the majority's view that Mr. Doe's action involved thought plus action, because Mr. Doe's presence in the park would not have been objectionable in the absence of his thoughts.

Citing *Robinson v. California*, 370 U.S. 660, 666 (1962), for the proposition that one cannot be punished because of their status alone, the dissent argued that the ban in Mr. Doe's case was akin to punishing a former bank robber for standing near a bank and thinking about robbing it or punishing a drug addict for standing outside a dealer's house and thinking about buying drugs.

Discussion

The majority's constitutional analysis was heavily influenced by its abhorrence of Mr. Doe's past crimes and current thoughts. The crux of the court's First Amendment reasoning lay in its characterization of the incident as not just thought, but "thought plus conduct." The act that in the court's view justified the First Amendment infringement was "[bringing] himself to the brink of committing child molestation" by going to a park where he was likely to find vulnerable children. This contrasts with the dissent's characterization of Mr. Doe's conduct as merely being present in a park, which would be unobjectionable in the absence of his thoughts. As the dissent implies, it is unlikely that "bringing oneself to the brink" of bank robbery by standing near a bank and thinking about robbing it would have received the same analysis. As the dissent also noted, although intended to serve public safety, the decision to punish a sex offender for thoughts revealed in the context of his self-help group could actually be detrimental because it discourages sex offenders from speaking openly in therapeutic groups and thereby inhibits their treatment.

Karen S. Wiviott, MD, JD
Fellow in Forensic Psychiatry
Case Western Reserve University
Cleveland, OH